

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JANE DOE and MARY ROE,

Plaintiffs,

No. C 06-1777 MHP

v.

GENERAL MICHAEL W. HAGEE, et al.

Defendants.

MEMORANDUM & ORDER
Re: Defendants' Motion to Dismiss

On March 8, 2006 plaintiffs Jane Doe and Mary Roe filed a complaint for injunctive relief and damages against defendants General Michael Hagee, Commandant of the United States Marine Corps; the United States Marine Corps; Donald Winter, Secretary of the Navy; Department of the Navy; Sergeant Brian Fukushima and Staff Sergeant Joseph Dunzweiler alleging that defendants violated plaintiffs' right to bodily integrity under the Fifth Amendment of the United States Constitution. Plaintiffs also allege claims sounding in tort under the Federal Tort Claims Act. On July 21, 2006 plaintiffs filed an amended complaint and have subsequently filed a second amended complaint.¹ Now before the court is defendants' motion to dismiss under Federal Rules of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, and Rule 12(b)(6), for failure to state a claim, or in the alternative, under Rule 12(e), for a more definite statement and Rule 12(b)(5) for insufficient service of process. Having considered the parties' arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

1 BACKGROUND

2 At the time of the incidents giving rise to this litigation, plaintiffs Jane Doe and Mary Roe
3 were seventeen-year-old high school students seeking to enlist in the Marine Corps. In Fall 2004
4 Doe, a resident of Ukiah, California, went to the Santa Rosa recruiting office to inquire about
5 becoming a Marine. A staff member in the Santa Rosa office referred her to defendant Joseph
6 Dunzweiler in the Ukiah office. In late fall of 2004 Doe met with Dunzweiler at the Ukiah
7 recruiting office. Plaintiffs allege that Dunzweiler cultivated an inappropriate, intimate relationship
8 with Doe after this initial meeting. According to plaintiffs' allegations, Dunzweiler pursued a sexual
9 relationship with Doe by asking her on dates, sending her sexual emails and telling her that he would
10 eventually get her alone. Doe contends Dunzweiler repeatedly insisted that she have sex with him,
11 telling her on multiple occasions that she must have sex with him in order to join the Marine Corps.
12 In January 2005 Dunzweiler took Doe into the back room of the Ukiah recruiting office and had sex
13 with her. Doe alleges that she did not want to have sex with Dunzweiler but did so because she
14 believed she had to comply to join the Marines. In February 2005 Doe and a friend who is not
15 named in this action went to the recruiting office and had dinner with Dunzweiler and another
16 Marine. After dinner, Doe, her friend and Dunzweiler returned to the office. Dunzweiler instructed
17 Doe's friend to type up some papers, then called Doe into the restroom where he again allegedly
18 coerced Doe into sexual intercourse. As a result of these two sexual encounters, Doe claims she
19 acquired a sexually transmitted disease.

20 Approximately two weeks after the second alleged sexual assault, Dunzweiler communicated
21 to Doe that she had to sleep at the Ukiah recruiting office before attending a recruiting function the
22 next day in Santa Rosa. When Doe refused, Dunzweiler instructed her that if she wanted to be a
23 Marine, she needed to report to the recruiting office by midnight and sleep there. Doe went to the
24 office with a friend who is not named in this action and plaintiff Roe. Other Marine Corps members,
25 including defendant Fukushima, were also in attendance. According to Doe, Dunzweiler insisted
26 that she sleep with him in his sleeping bag; when she refused, he berated her. Doe claims that
27 Dunzweiler pressured her into having intercourse with him again.

1 Doe alleges that other Marines present were aware of Dunzweiler's intentions and his
2 previous sexual encounters with Doe. Furthermore, while Dunzweiler was having sex with Doe,
3 defendant Fukushima and another Marine allegedly were having sex with other high school female
4 recruits at the recruiting office. Plaintiff Roe alleges that when she arrived at the "sleepover," she
5 was in an extremely intoxicated state and vomited on herself soon after arriving. Roe further claims
6 that Fukushima forcibly raped her and that her intoxicated condition prevented her from resisting.
7 Roe claims that other Marines were also present while she was being raped and were aware of what
8 was occurring. Roe further claims that the other officers present were aware of Fukushima's alleged
9 history of sexual misconduct with recruits at the Ukiah recruiting office and other locations.

10 Based on these allegations, plaintiffs seek injunctive relief to prevent defendants Hagee,
11 Winter, the United States Marine Corps and the Department of the Navy from violating plaintiffs'
12 constitutional rights in the future. Plaintiffs also seek to require those defendants to properly train
13 and supervise U.S. Marine Corps recruiters and servicemembers. Plaintiffs claim they seek to enlist
14 in the Marines and participate in further recruitment activities and therefore need the protection of an
15 injunction. Plaintiffs also seek monetary damages for pain and suffering, compensation of medical
16 expenses, lost career and employment opportunities and attorney's fees and costs.

17 Defendants filed a motion to dismiss plaintiffs' claims for lack of subject matter jurisdiction.
18 Jurisdiction is improper over plaintiffs' claims under the Federal Tort Claims Act ("FTCA"),
19 28 U.S.C. sections 2671-80, on the basis that the United States is the only proper defendant in an
20 FTCA action. They also argue that plaintiffs have failed to execute proper service of process.
21 Defendants contend that the plaintiffs' claims under the Administrative Procedures Act ("APA"),
22 5 U.S.C. section 701 are moot because the defendants Fukushima and Dunzweiler have been
23 discharged and no longer present a threat to plaintiffs and because plaintiffs have not sought to enlist
24 in the Marines or participate in any further recruitment activities.

25 Defendants also assert that plaintiffs have failed to state actionable claims under the FTCA
26 and the APA. They claim that plaintiffs' FTCA claims are barred by the intentional tort exclusion of
27 the FTCA. Finally, defendants allege that plaintiffs cannot sue federal defendants for injunctive
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1 relief under the APA because plaintiffs have not challenged a final agency action and have failed to
2 show they lack an adequate legal remedy.

3 4 LEGAL STANDARD

5 I. Motion to Dismiss 12(b)(1), Lack of Subject Matter Jurisdiction

6 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) tests the subject matter
7 jurisdiction of the court. See, e.g., Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039–40
8 (9th Cir. 2003), cert. denied, 541 U.S. 1009 (2004). The plaintiff bears the burden of establishing
9 the propriety of the court’s jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,
10 377 (1994). Consequently, a Rule 12(b)(1) motion will be granted if the complaint, when
11 considered in its entirety, fails to allege on its face facts sufficient to establish subject matter
12 jurisdiction. Savage, 343 F.3d at 1039 n.2; Thornhill Publ’g Co. v. General Tel. & Elecs. Corp., 594
13 F.2d 730, 733 (9th Cir. 1979). Alternatively, a defendant may seek dismissal under Rule 12(b)(1) by
14 presenting evidence to refute the jurisdictional facts alleged in the complaint. Id. Once the
15 defendant has introduced such evidence, the plaintiff “must furnish affidavits or other evidence
16 necessary to satisfy its burden of establishing subject matter jurisdiction.” Savage, 343 F.3d at 1039
17 n.3 (citation omitted).

18 19 II. Motion to Dismiss 12(b)(6), Failure to State a Claim

20 A motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) will be denied
21 unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or
22 her to relief. Conley v. Gibson, 355 U.S. 41, 45–46 (1957); Fidelity Financial Corp. v. Fed. Home
23 Loan Bank of S. F., 792 F.2d 1432, 1435 (9th Cir. 1986), cert. denied, 479 U.S. 1064 (1987).
24 Allegations of material fact are taken as true and construed in the light most favorable to the
25 nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996). Dismissal
26 can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under
27 a cognizable legal theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

1 The court need not, however, accept as true allegations that are conclusory, legal conclusions,
2 unwarranted deductions of fact or unreasonable inferences. See Sprewell v. Golden State Warriors,
3 266 F.3d 979, 988 (9th Cir. 2001); Clegg v. Cult Awareness Network, 18 F.3d 752, 754–55 (9th Cir.
4 1994).

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6 III. Motion for a More Definite Statement 12(e)

7 “It is well-established . . . that a motion for a more definite statement attacks unintelligibility
8 in a pleading, not a mere lack of detail.” Campos v. S. F. State Univ., No. C 97–2326, 1999 WL
9 1201809, at *8 (N.D. Cal. June 26, 1999) (Chesney, J.). Therefore, a “motion for a more definite
10 statement should be granted only where the complaint is so indefinite that defendant cannot ascertain
11 the nature of the claim being asserted and therefore cannot reasonably be expected to frame an
12 appropriate response.” City of Oakland v. Keep on Trucking Co., No. C 95–03721, 1998 WL
13 470465, at * 1 (N.D. Cal. July 30, 1998) (Breyer, J.). See also Simpson v. Martin, Ryan, Andrada &
14 Lifter, No. C 96–4590, 1997 WL 542701, at * 2 (N.D. Cal. Aug. 26, 1997) (Smith, J.) (stating “[t]he
15 Court must deny the motion if the complaint is specific enough to apprise defendant of the substance
16 of the claim being asserted”). “If the detail sought by a motion for more definite statement is
17 obtainable through discovery, the motion should be denied.” Beery v. Hitachi Home Elec.
18 (America), Inc., 157 F.R.D. 477, 480 (C.D. Cal. 1993) (citations omitted).

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20 DISCUSSION

21 I. Lack of Subject Matter Jurisdiction

22 Defendants contend that this court lacks subject matter jurisdiction over plaintiffs’ FTCA
23 claims because plaintiffs have sued individual members and officers of the Marine Corps, and the
24 Marines, but not the proper defendant in an FTCA action, the United States. Additionally,
25 defendants contend that the court lacks jurisdiction over plaintiffs’ APA claims because their claims
26 do not state a live case or controversy thus depriving federal courts of subject matter jurisdiction
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1 pursuant to Article III of the United States Constitution. See SEC v. Med. Comm. for Human
2 Rights, 404 U.S. 403, 407 (1972).

3 A. Federal Tort Claims Act

4 The proper parties under the FTCA has been directly addressed by the Ninth Circuit. In
5 Allen v. Veterans Admin., 749 F.2d 1386 (9th Cir. 1984), the court held: “The Federal Tort Claims
6 Act provides that the United States is the sole party which may be sued [under the FTCA] for
7 personal injuries arising out of the negligence of its employees. Individual agencies of the United
8 States may not be sued.” Id. at 1388 (citations omitted). However, an FTCA claim brought against
9 the Marine Corps or the Marines is properly treated as brought against the United States. Anderson
10 v. U. S. Postal Service, 761 F.2d 527 (9th Cir. 1985) (per curiam) (affirming district court’s
11 treatment of FTCA suit brought against the Postal Service as against the United States).

12 The plaintiffs have properly served government defendants by serving process on a United
13 States Attorney for the district in which the action was brought. Fed. R. Civ. P. 4(i)(1)(A). Where
14 service is made properly on the United States Attorney but the complaint names the organization of
15 the United States being sued instead of the United States, service is still proper upon the United
16 States. Husek v. IRS, 778 F. Supp. 598 (N.D.N.Y. 1991).

17 Accordingly, defendants’ motion to dismiss plaintiffs’ FTCA claims for lack of subject
18 matter jurisdiction and insufficient service of process are denied. However, the United States is
19 hereby substituted for the United States Marine Corps and the Department of the Navy.

20 B. Administrative Procedures Act

21 Defendants also assert that this court lacks jurisdiction to hear plaintiffs’ claim for injunctive
22 relief under the APA because the claim is moot. First, defendants contend that plaintiffs’ claim is
23 moot because defendants Dunzweiler and Fukushima have been tried in a military court and
24 discharged from the Marines. They also argue that the claim is moot because Doe and Roe have not
25 sought to enlist in the Marines or participate in any recruitment activities. The court will address
26 each argument in turn.
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1 “The burden of demonstrating mootness is a heavy one.” Northwest Envtl. Def. Ctr. v.
2 Gordon, 849 F.2d 1241, 1243 (9th Cir. 1988) (citations omitted). A moot claim is one that has “lost
3 its character as a present, live controversy.” American Tunaboat Ass’n v. Brown, 67 F.3d 1404,
4 1407 (9th Cir. 1995) (citations omitted). In the context of a request for injunctive relief, where the
5 activities sought to be enjoined have already occurred and the courts “cannot undo what has already
6 been done, the action is moot.” Friends of the Earth, Inc. v. Bergland, 576 F.2d 1377, 1379 (9th Cir.
7 1978).

8 Defendants first argue that plaintiffs’ claims are moot because the individual defendants who
9 plaintiffs allege committed the sexual assaults have been discharged from the Marines. “The basic
10 question in determining mootness is whether there is a present controversy as to which effective
11 relief can be granted.” Gordon, 849 F.2d at 1244. A case is moot when two conditions have been
12 satisfied: (1) when “there is no reasonable expectation that the alleged violation will recur, and (2)
13 interim relief or events have completely and irrevocably eradicated the effects of the alleged
14 violation.” County of L.A. v. Davis, 440 U.S. 625, 631 (1979).

15 The fact that Dunzweiler and Fukushima have been discharged from the Marines certainly
16 reduces the likelihood that plaintiffs would suffer sexual assaults by those two defendants. The
17 plaintiffs allege, however, that other Marines condoned the alleged sexual assaults perpetrated by
18 Dunzweiler and Fukushima. If these allegations are true, the presence of those other Marines, who
19 may still be members of the Marine Corps, persuades the court that there is still a cognizable threat
20 to plaintiffs should they seek to enlist. Therefore, plaintiffs have a “reasonable expectation” that
21 sexual assaults might occur and the discharge of two Marines does not “eradicate the effects” of the
22 violation. Id.

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24 Dunzweiler and Fukushima’s discharge from the Marines does not render moot plaintiffs’
25 claim for injunctive relief for negligent supervision and training. Doe alleges that other Marines
26 were present during two of the sexual assaults and aware of what was happening but did not
27 intervene. All of the alleged sexual assaults took place at the recruiting office during official
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1 recruiting activities. These facts suggest that removal of the two offending officers would not
2 necessarily “eradicate the effects” of negligent supervision and training. Id. Therefore, plaintiffs
3 have made sufficient allegations to demonstrate a present controversy.

4 Defendants’ second argument is that plaintiffs’ claim is moot because plaintiffs have not
5 sought to enlist or participated in recruitment activities since the alleged sexual assaults. To support
6 their contention, defendants erroneously rely on Bird v. Lewis & Clark Coll., 303 F.3d 1015 (9th
7 Cir. 2002). Bird held that plaintiff, a disabled college student who alleged that she was
8 discriminated against on the basis of her physical disability in the course of a college study abroad
9 program, did not have standing to bring such a challenge. Id. at 1017–19. The Ninth Circuit did not
10 address whether her claim was moot. Id. at 1019–24. In that case, the plaintiff had no plans to
11 return to the college or participate in their overseas programs in the future. Id. at 1020. The Ninth
12 Circuit concluded that the plaintiff could not demonstrate a real or immediate threat that the
13 defendant would discriminate against her again. Id. at 1015. Bird is distinguishable from the instant
14 action because plaintiffs Doe and Roe still have the opportunity to enlist in the Marines, unlike the
15 plaintiff in Bird who was not eligible to participate in the program without re-enrolling in the
16 university. Significantly, the plaintiffs in the instant case have alleged their intent to enlist in the
17 military in the future. First Amended Complaint (“FAC”) ¶ 5.

18 The more compelling case for defendants is City of L. A. v. Lyons, 461 U.S. 95 (1983). In
19 Lyons, plaintiff sought injunctive relief to stop the practice of chokehold detentions by the Los
20 Angeles Police Department in certain circumstances. The Supreme Court held that Lyons had not
21 overcome the case or controversy requirement because his claim was conjectural.² Crucial to the
22 Court’s ruling was the plaintiff’s failure to establish either that all police in Los Angeles always
23 choke any citizen with whom they have an encounter or, alternatively, that the City ordered or
24 authorized all police officers to act in this manner. Id. at 105–06. The court found plaintiff’s
25 allegation that he risked being subjected to a chokehold in the future too abstract. Past exposure to
26 illegal conduct does not necessarily mandate injunctive relief. Id.

1 Doe and Roe argue that they are entitled to seek an injunction because the defendants have
2 engaged in a pattern or practice of constitutional violations or unofficial policies promoting
3 constitutional violations. Their allegations are sufficient to overcome the analysis in Lyons.
4 Plaintiffs have alleged that they are likely to have another encounter with the Marines and their
5 recruiters because they intend to enlist in the Marines. FAC ¶ 5. While plaintiffs have not alleged
6 that all Marine recruiters always sexually assault recruits, they have alleged that the Marines
7 condoned the practice of sexually assaulting recruiters sufficient to overcome defendants' motion to
8 dismiss. In LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985), the Ninth Circuit distinguished
9 Lyons, and affirmed the grant of an injunction on the basis that the plaintiff in LaDuke had shown an
10 officially sanctioned pattern of behavior that was distinctly lacking in Lyons. Id. at 1324 (“[The
11 Lyons Court] expressly noted the absence of any written or oral pronouncements by the Los Angeles
12 Police Department sanctioning the unjustifiable application of the chokehold and pointed to the
13 absence of ‘any [record] evidence showing a pattern of police behavior’ suggestive of an
14 unconstitutional application of the chokehold.”). Here, plaintiffs have not yet been given the
15 opportunity to present such a record, and defendants have not shown that it would be impossible for
16 them to do so. It is important to note that Lyons and LaDuke were at the procedural stage at which a
17 motion for injunction was before the court and factual records had been developed for that purpose.
18 Here, the parties are at the early stages of the case on a motion to dismiss and where no discovery
19 has been taken. See Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131, 1142 (N.D. Cal. 2000)
20 (Fogel, J.) (distinguishing Lyons, in which the Court based its decision on a full evidentiary record,
21 not the untested allegations of the complaint).

22 Accordingly, defendants' motion to dismiss plaintiffs' claims for injunctive relief on the
23 grounds of mootness is denied.
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1 II. Failure to State a Claim

2 In their motion to dismiss, defendants assert that plaintiffs' claims are barred by the
3 intentional tort exception to the FTCA and thus fail to state a claim upon which relief can be
4 granted. Defendants also claim that because plaintiffs are not challenging a final agency action,
5 their claims are not cognizable under the APA. Defendants contend their claim for injunctive relief
6 is likewise barred because they have failed to show they lack an adequate legal remedy.

7 A. Federal Tort Claims Act

8 Defendants urge the court to dismiss plaintiffs' FTCA claim on the basis that it is barred by
9 the intentional torts exception to the FTCA. The FTCA waives sovereign immunity for torts
10 committed by government employees acting within the scope of their employment.
11 28 U.S.C. § 2680(h). Sovereign immunity is not waived, however, when the claim arises out of an
12 intentional tort, such as assault or battery. "[T]he general rule [is] that the Government is not liable
13 for the intentional torts of its employees." Sheridan v. United States, 487 U.S. 392, 395 (1988).
14 However, the government is not insulated from liability in all instances involving an intentional tort.
15 Id. at 400. When government employees negligently allow a foreseeable assault or battery to occur,
16 the government may be liable. Id. at 401.

17 Assuming arguendo that plaintiffs have stated a cause of action for negligence, it is not
18 barred by the FTCA. The Ninth Circuit has held that claims for negligent hiring and supervision of
19 a federal employee are not barred by the intentional torts exception of the FTCA even when the
20 negligence results in an intentional tort. See Brock v. United States, 64 F.3d 1421 (9th Cir. 1995)
21 (holding that a claim of negligent hiring and supervision of a federal employee was not barred by the
22 assault and battery exception when the underlying action was rape); Bennett v. United States, 803
23 F.2d 1502 (9th Cir. 1986) (holding that the government was liable under the FTCA for the negligent
24 hiring and supervision of a teacher who kidnapped, assaulted and raped several children enrolled at
25 the school where he taught); Senger v. United States, 103 F.3d 1437 (9th Cir. 1996) (permitting an
26 FTCA claim to proceed for negligent failure to warn about postal employee's dangerous
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1 proclivities). Therefore, negligent hiring, supervision and failure to warn claims are not barred by
2 the FTCA's intentional torts exception.

3 In their opposition to defendants' motion to dismiss, plaintiffs state their causes of action to
4 be negligent hiring, supervising and training of defendants Dunzweiler and Fukushima, and the
5 negligent failure to warn plaintiffs of potential dangers of being recruited into the Marines. Pls.'
6 Opp'n, 2. Plaintiffs assert that their amended complaint sufficiently alleges negligence. However,
7 the amended complaint is far from clear. Plaintiffs fail to specify their intended causes of action
8 under the FTCA and make only conclusory legal assertions about defendant's alleged negligence.
9 Although plaintiffs allege that other Marines were present when the alleged sexual assaults took
10 place, and other Marines knew of Dunzweiler and Fukushima's alleged past sexual indiscretions
11 with recruits, this is far from pleading "[the] necessary element of a claim for negligent
12 supervision[,] . . . that the employer knows or should have known that the employee presented a risk
13 of danger to others." Ayon v. Lincare Inc., C05-0808C, 2006 WL 2469112, at *3 (W.D. Wash.
14 Aug. 14, 2006) (citation omitted). The fact that other Marines may have been present at or aware of
15 the misconduct will not necessarily give rise to negligent hiring, supervision or training claims. The
16 claims will lie only if such Marines had supervision, training or hiring responsibilities.

17 For the purposes of the FTCA, there is a legally significant distinction between an intentional
18 tort and a negligence claim. Plaintiffs have failed to plead sufficient facts to make out a cause of
19 action for negligence. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001);
20 Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). Therefore, the defendants'
21 motion to dismiss for failure to state an actionable claim under the FTCA is granted without
22 prejudice. The court further grants plaintiffs leave to amend their complaint to allege facts sufficient
23 to sustain a cause of action for negligent hiring, supervision and failure to warn.

24 Plaintiffs' claims are not "so indefinite that defendant cannot ascertain the nature of the claim
25 being asserted and therefore cannot reasonably be expected to frame an appropriate response,"
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1 however, and therefore leave to amend is appropriate. Keep on Trucking Co., 1998 WL 470465, at
2 * 1. Accordingly, defendants' motion for a more definite statement is denied.

3 B. Administrative Procedures Act (APA)

4 Defendants assert that plaintiffs have failed to state a claim under the Administrative
5 Procedures Act, 5 U.S.C. section 701 et seq. Defendants argue that plaintiffs have not stated a valid
6 claim under the APA because they have not challenged a final agency action. Defendants also argue
7 that injunctive relief is inappropriate because plaintiffs have failed to show that they lack an
8 adequate legal remedy. The court addresses each argument below.

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10 1. Final Agency Action

11 APA section 702 waives sovereign immunity for actions seeking injunctive relief. "A person
12 suffering legal wrong because of any agency action, or adversely affected or aggrieved by such
13 action within the meaning of any relevant statute, shall be entitled to judicial review thereof."
14 5 U.S.C. § 702. Defendants argue that plaintiffs' claim under the APA must be dismissed because
15 plaintiffs have not identified a final agency action subject to judicial review and thus sovereign
16 immunity bars this suit as a matter of law. In support of this proposition, defendants cite cases
17 construing the "final agency action" requirement of APA section 702 as limited by the definition of
18 "agency action" in section 551(13). See San Carlos Apache Tribe v. United States, 272 F.Supp. 2d
19 860, 883 (D. Ariz. 2003) ("[W]hen review is . . . [sought] under the general review provisions of the
20 APA, 5 U.S.C. § 702, Plaintiffs . . . must show that they have been affected by some "agency action"
21 as defined in section 551(13)."). The Ninth Circuit has expressly declined to import the more rigid
22 definition of "agency action" of section 551(13) into section 702's waiver of sovereign immunity.
23 See Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 526 (9th Cir. 1989). Instead, the
24 waiver of sovereign immunity applies in "all actions seeking relief from official misconduct except
25 for money damages." Id. at 525. Under this reading of 702, plaintiffs' claims for injunctive relief
26 are not barred by sovereign immunity.

Defendants raise a related point that APA section 704 confines judicial review to final agency action. 5 U.S.C. § 704. “Final agency action” under 704 is that which 1) “mark[s] the consummation of the agency’s decisionmaking process;” and 2) action “by which rights or obligations have been determined, or from which legal consequences flow.” Nippon Miniature Beargin Crop. v. Weise, 230 F.3d 1131, 1137 (9th Cir. 2000) (citing Bennett v. Spear, 520 U.S.154, 177 (1997)). Construing the facts in the light most favorable to plaintiffs, the court finds that they have alleged sufficient facts to overcome a motion to dismiss on the final agency action requirement.

Plaintiffs have alleged that the defendants had “a specific policy—of condoning and permitting rape,” an allegation that suggests that the policy resulted from defendant’s decisionmaking process. Pls.’ Opp’n 6, n.2. Cf. Ecology Ctr., Inc. v. U. S. Forest Serv., 192 F.3d 922, 925 (9th Cir. 1999) (concluding that an agency’s failure to monitor is not agency action because it does not represent the culmination of a decision-making process). Plaintiffs also allege that Marines other than defendants Fukushima and Dunzweiler were aware of and complicit in the alleged sexual assaults. FAC ¶¶ 10–12. A policy of permitting rape, as plaintiffs have alleged, would most certainly satisfy the second prong of the test because it has an “actual or immediately threatened effect” on the plaintiffs. Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 894 (1990). Therefore, the court rejects defendants’ contention that plaintiffs have failed to allege final agency action.

2. Lack of Adequate Legal Remedy

Defendants also argue that the plaintiffs have failed to show that they lack an adequate legal remedy. For a court to grant equitable relief there must generally be no adequate legal remedy. Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 558 (9th Cir. 1990) Defendants point to other remedies, including a suit under the FTCA, for redress of the plaintiffs’ alleged injuries. However, a suit for damages under the FTCA is an adequate remedy only for the causes of action based on the past sexual assaults suffered by the plaintiffs. However, there are no adequate remedies at law for plaintiffs’ claims of future injury as a result of their fear of future sexual assault if they enlist in the Marines. “Past injury may entitle the victim to relief in the form of damages, but it is simply

1 insufficient to obtain an injunction.” Nava v. City of Dublin, 121 F.3d 453, 458–59 (9th Cir. 1997),
2 overruled in part on other grounds, Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1041 (9th Cir.
3 1999). In the instant case, plaintiffs have alleged more than past injury. They allege an on-going
4 and future injury. In an analogous context, the Supreme Court has determined that when an
5 individual is deterred from seeking an employment opportunity because of the unlawful acts of the
6 employer, equitable relief is the precise remedy. See International Bro. of Teamsters v. United
7 States, 431 U.S. 324, 367 (1977) (“Victims of gross and pervasive discrimination could be denied
8 relief precisely because the unlawful practices had been so successful as totally to deter job
9 applications from members of minority groups.”) (internal quotations and citations omitted).
10 Therefore, the court rejects defendants’ argument that plaintiffs have failed to allege that they have
11 inadequate remedy at law.

1 CONCLUSION

2 For the foregoing reasons, the court hereby DENIES defendants' motion to dismiss for lack
3 of subject matter jurisdiction as to the FTCA claim and the APA claim. The court hereby GRANTS
4 defendants' motion to dismiss without prejudice on the basis that, as alleged, plaintiffs have failed to
5 state a claim under the FTCA since it rests only on allegations of an intentional tort. The court
6 concurrently GRANTS plaintiffs leave to amend their complaint to plead a cause of action that
7 sounds in negligence and consistent with this order. Plaintiffs are ordered to file their amended
8 complaint within thirty days of the date of this order. The court DENIES defendants' motion to
9 dismiss for failure to state a claim under the APA.

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11 IT IS SO ORDERED.

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15 Dated: Jan. 11, 2007



MARILYN HALL PATEL
District Judge
United States District Court
Northern District of California

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ENDNOTES

1. The court notes that the plaintiffs' Second Amended Complaint suffers from the same infirmities as the First Amended Complaint discussed herein and that the plaintiffs will have to amend their complaint to comply with this order. The Second Amended Complaint adds several new causes of action based on violations of various international treaties. The court advises plaintiffs to acquaint themselves with the proper methods for pursuing their existing constitutional claims before commencing a foray into the territory of international law.
2. The portions of Lyons relied upon by defendants address the Article III case or controversy requirement generally rather than mootness, which the Court addressed in a separate part of the opinion.